Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

LARRY COOPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether an employee who is subjected to wrongful treatment by his employer because of discriminatory motives is limited to seeking relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, or may pursue alternative causes of action.

2. Certiorari should be granted to clarify whether a federal employee, such as petitioner, who has been subjected to a continuous and malicious pattern of harassment and emotional distress by his federal employer can bring an action under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, for imposition of emotional distress.

3. Certiorari should be granted to settle the question of whether a former federal employee can bring an action under the Federal Tort Claims Act for emotional distress caused by post employment actions of his former federal employer.

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OPINIONS BELOW

On April 24, 1997, the United States Court of Appeals for the Ninth Circuit issued its Memorandum Opinion affirming the decision of the District Court. On July 21, 1997, petitioner's petition for rehearing was denied. The Ninth Circuit held that its memorandum opinion was not to be published or cited except as provided by Circuit Rule 36-3.

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision and judgment of April 24, 1997, of the United States Court of Appeals for the Ninth Circuit and its denial dated July 21, 1997, of the petition for rehearing. The judgment affirmed the lower court's dismissal of petitioner's complaint. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 2674 provides in pertinent part:

> § 2674. Liability of the United States
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> * * *
>
> With respect to any claim under this chapter, the United States shall be entitled

to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

STATEMENT OF THE CASE

Petitioner, Larry Cooper, is a former civilian employee of the United States Navy with approximately twenty years of service at the Naval Supply Center, San Diego, California (hereinafter "agency"), doing clerical and warehouse work. He began working for the agency in 1971 as part of a summer youth program. Because of his excellent work performance he was hired in 1972 as a full-time employee, and he continued working there, except for one year in the United States Army Reserve, until he was placed off work for medical reasons in October 1990, and then removed as of April 1, 1991.

During his career Mr. Cooper received over fifteen awards and citations for excellent performance. He also achieved recognition in the employees' union for his union work and representation of employees. However, apparently because of his union activities, Mr. Cooper became the victim of a continuous pattern of acts of discrimination and harassment by his agency supervisors and management, commencing as early as 1983 and continuing thereafter throughout his employment with the agency, and beyond.

The acts of harassment included constant ridicule, watching and following by his supervisors, even when he went to the restroom, vulgar personal remarks, threats of physical harm by

his supervisors and daily verbal abuse, refusal to allow him to seek medical care for chest pain, a break-in of his personal locker engineered by management, as well as two break-ins of his automobile, and being sent to a building where he was overcome by toxic fumes.

Mr. Cooper obtained several favorable settlements and cease and desist orders as a result of Fair Labor Relations Act charges against management, as well as several favorable EEO settlements. However, those orders and settlements were repeatedly violated by management; and on a daily basis until October 20, 1990, his last day of work, he continued to be harassed, threatened, followed, monitored, assigned undesirable job duties, isolated, embarrassed and demoralized in front of other employees. He was forced to go through numerous involuntary transfers, refused job performance evaluations, overlooked for numerous promotions, and denied legitimate sick leave.

As a result of the ongoing harassment he was placed on disability during the period August 28, 1989 through December 13, 1989. Upon his return to work, the harassment and humiliation continued and by October 1990 his hostile work environment had become so unbearable that he was unable to continue working. On October 25, 1990, the doctor at the Naval Station Dispensary placed him off work and recommended that he contact an Office of Workers Compensation representative and a private physician.

While still on medical leave and under a doctor's care he received several harassing letters from the agency, culminating in a letter informing him that he was being terminated from employment as of April 1, 1991.

Even after his removal, the agency continued to inflict emotional distress upon Mr. Cooper by engaging in a series of

harassing actions which included knowingly filing a false statement with the Merit Systems Protection Board (MSPB) as to his retirement, thus causing his MSPB appeal of his discharge to be dismissed and delayed for approximately seventeen months before the dismissal was reversed, knowingly providing false information to a congressional representative, refusing to assist him with his disability retirement rights, maliciously placing a wrongful debt against him, and providing incorrect information concerning his record of performance, attendance, and conduct.

Mr. Cooper's treating physicians and other medical experts have determined that the years of harassment and severe emotional stress to which he was subjected by his former employer have caused a major depression and severe anxiety disorder from which he still suffers. His emotional illness has prevented him from working and caused the loss of his home and family.

On July 22, 1994, Mr. Cooper brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.* for intentional and negligent infliction of emotional distress by employees and management of the Naval Supply Center, alleging a pattern of discrimination, retaliation, and harassment against him starting in 1983 and continuing thereafter, as described above, but with further details and elaboration. His complaint was timely filed in the United States District Court for the Southern District of California following denial on January 24, 1994, of the administrative claim which he had filed with the Department of the Navy pursuant to 28 U.S.C. § 2675.

The district court granted the government's motion to dismiss Mr. Cooper's original complaint without prejudice, on grounds that his causes of action were preempted by Title VII of the Civil Rights Act of 1964 (Title VII) and the Civil Service Reform Act of 1978, which is scattered throughout Title 5 of the United States Code (CSRA).

Mr. Cooper filed an amended complaint under the FTCA for negligent and intentional infliction of emotional distress. The government again moved to dismiss and the government's motion again was granted, on grounds that the FTCA causes of action were either time barred or preempted by Title VII or the CSRA. The government had also claimed that his cause of action was preempted by the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101, *et seq.*, but the district court found that it was unnecessary to consider that question.

Mr. Cooper appealed *pro se* to the Ninth Circuit, pointing out that the administrative claim which he had filed on October 30, 1992 had alleged a concerted and orchestrated harassment by management resulting in his removal April 1, 1991, and that the prior alleged instances of harassment were not time barred since they formed part of a continuing tort of infliction of emotional distress, for which the statute of limitations does not start to run until the last tortious act, citing *Gross v. United States*, 676 F.2d 295, 299-300 (8th Cir. 1982).

He also pointed out that in alleging a pattern of tortious conduct, racial discrimination was mentioned in the original complaint and amended complaint as merely one of the agency's motives in a pattern of infliction of emotional distress, and that the possibility of proving racial discrimination did not preclude him from pursuing alternative remedies which do not require proof of discrimination. He also urged that the CSRA should not be held to preempt FTCA remedies in the situation of long and continuous malicious abuse and harassment by the agency involved in this case.

On April 24, 1997, the Ninth Circuit issued a memorandum opinion, not for publication, affirming the district court's dismissal. On July 21, 1997, the Court of Appeals denied petitioner's motion for rehearing.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER AN EMPLOYEE WHO IS SUBJECTED TO WRONGFUL TREATMENT BY HIS EMPLOYER BECAUSE OF DISCRIMINATORY MOTIVES IS LIMITED TO SEEKING RELIEF UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e, *et seq.*, OR MAY PURSUE ALTERNATIVE CAUSES OF ACTION.

In affirming dismissal of this case the Ninth Circuit found that petitioner's claims were preempted by either Title VII or by the CSRA. The circuit court held that Cooper's FTCA claims were preempted by Title VII to the extent that they were premised upon racial discrimination, citing *Brown v. General Services Administration*, 425 U.S. 820 (1976), unless the allegations fit a "highly personal violation" exception to Title VII preemption, citing *Otto v. Heckler*, 781 F.2d 754 (9th Cir.), *amended by* 802 F.2d 337 (9th Cir. 1986) and *Kent v. Howard*, 801 F. Supp. 329 (S.D. Cal. 1992).

In fact, although some of the petitioner's allegations are of "highly personal" conduct (including vulgar personal remarks, threats of physical harm, and breaking into his personal locker and automobile), petitioner submits that *Otto v. Heckler* and *Kent v. Howard* are not relevant to this case since they dealt with state tort claims brought against individual supervisors; and that the Ninth Circuit is improperly injecting this concept into a case where the respondent is not attempting to sue individual supervisors, but is suing the federal government.

Further, this case is not brought under Title VII and does

not seek relief under Title VII.[1] It alleges a pattern of wrongful, malicious conduct which inflicted emotional distress.

Respondent mentioned discrimination as one of the motives for agency action in this case, but he did not limit his allegations to racial discrimination, and alleged that the harassing actions also were taken in retaliation for his union involvement and activities.

Brown v. GSA, supra, upon which the Ninth Circuit relies, holds that a racial discrimination suit must be brought under Title VII after exhausting the administrative remedies required for such suits, but it does not hold that an employee is precluded from pursuing any available alternative remedies which do not require proof of discrimination. Accordingly, respondent urges this Court to consider and reject the Ninth Circuit's holding that an employee who is subjected to wrongful treatment by his employer because of discriminatory motives, as well as other motives, is limited to seeking relief under Title VII, unless he has alleged "highly personal violations."

---

1. In fact, a companion case brought by petitioner under Title VII and the Rehabilitation Act for race and handicap discrimination is currently pending in the United States District Court for the Southern District of California. The government moved to dismiss that case on jurisdictional grounds because it was filed in the district court as a "mixed case" after the government had obtained dismissal of petitioner's "mixed" appeal to the MSPB as moot by substituting petitioner's disability retirement for the removal from which petitioner had appealed. The district court transferred the case to the Federal Circuit which affirmed the dismissal of the MSPB appeal as moot and then transferred the case back to the district court. Petitioner anticipates that the government may try again to have the case dismissed.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A FEDERAL EMPLOYEE, SUCH AS PETITIONER, WHO HAS BEEN SUBJECTED TO A CONTINUOUS AND MALICIOUS PATTERN OF HARASSMENT AND EMOTIONAL DISTRESS BY HIS FEDERAL EMPLOYER CAN BRING AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. § 2671, *et seq.*, FOR IMPOSITION OF EMOTIONAL DISTRESS.

The Ninth Circuit held that any of petitioner's claims not preempted by Title VII are preempted by the CSRA, citing *Rivera v. United States*, 924 F.2d 948 (9th Cir. 1991) and *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991).

In *Saul* the Ninth Circuit held that a federal employee could not bring state and constitutional tort claims based on allegations that his supervisor had seized and opened personal mail addressed to him at the office, thereby violating his constitutional rights and invading his privacy, had twice defamed him by a letter placed in his personnel file and during a phone call to a congressional aide, and had inflicted emotional distress by prohibiting him from sitting at his desk before 8 a.m. and from coming to work on weekends. In affirming summary judgment for the government the Ninth Circuit found that the actions alleged came within the definition of "personnel actions" and "prohibited personnel practices" as set forth by the CSRA in 5 U.S.C. § 2302 and that the CSRA precluded and preempted the plaintiff's causes of action.

In *Rivera* the Ninth Circuit held that the CSRA precluded relief to a federal employee under the FTCA for alleged retaliatory harassment by her supervisor. The circuit court noted that the only court of appeals to address directly the question of

whether the CSRA precludes suit under the FTCA was *Premachandra v. United States*, 739 F.2d 392 (8th Cir. 1984), which had been brought by a government physician under the FTCA for the anguish and losses suffered upon his discharge. In that case the court of appeals found that the CSRA precluded relief.

The court of appeals in *Rivera* also noted that "[w]hile the Supreme Court has not directly considered the relationship between the CSRA and the FTCA, in two cases the Court has expounded on the comprehensive nature of the remedial scheme embodied in the CSRA and held that the scheme precludes other types of remedies," citing *Bush v. Lucas*, 462 U.S. 367, 388, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648 (1983) (involving a First Amendment *Bivens* claim), and *United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988) (involving a suit for backpay under the Tucker Act, 28 U.S.C. § 1491).

On the other hand, FTCA suits against the federal employer by federal employees for infliction of emotional distress have been approved and upheld in other contexts, even by the Ninth Circuit. *See, e.g., Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990); *see also, Santiago-Ramirez v. Secretary of Dept. of Defense*, 984 F.2d 16 (1st Cir. 1983); *Gergick v. Austin*, 764 F. Supp. 580 (W.D. Mo. 1991); *Underwood v. U.S. Postal Service*, 724 F. Supp. 968 (M.D. Tenn. 1990).

Moreover, in *Brock v. United States*, 64 F.3d 1421, 1425 (9th Cir. 1995), the Ninth Circuit found that a federal employee who had suffered rape and sexual abuse at the hands of her supervisor could bring an FTCA action for negligent supervision against the government, and rejected the government's claim that such an action was preempted by the CSRA.

The Supreme Court in *Bush* and *Fausto* indicated the

comprehensive nature of the remedial scheme embodied in the CSRA by Congress. Nevertheless, the Federal Tort Claims Act has been amended since the passage of the CSRA Act of 1978, *see* Pub. L. 100-694 effective Nov. 18, 1988, and Congress has never seen fit to include a provision precluding FTCA suits by federal employees.

Moreover, cases such as *Rivera*, *Saul*, and *Premachandra*, which limited federal employees to CSRA remedies, involved well-defined, on-the-job personnel actions for which the employee could have sought relief through the CSRA with relative ease. The agency's pattern of conduct in the instant case would have required petitioner to raise constant challenges through CSRA procedures and the Office of Special Counsel; and even when petitioner challenged agency action and obtained favorable orders and agreements, the pattern of harassment continued.

Petitioner urges that in the situation here involved, with a pattern of years of frequent and intentional abuse and harassment which has caused the petitioner severe emotional injury, inability to work, and personal and financial loss, this Honorable Court should consider and reject the Ninth Circuit's holding that his right to sue the government for emotional injury has been preempted by the CSRA.

III.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION OF WHETHER A FORMER FEDERAL EMPLOYEE CAN BRING AN ACTION UNDER THE FEDERAL TORT CLAIMS ACT FOR EMOTIONAL DISTRESS CAUSED BY POST EMPLOYMENT ACTIONS OF HIS FORMER FEDERAL EMPLOYER.

Petitioner alleged in this action that the agency continued to inflict emotional distress upon him following his removal by conduct including, but not limited to, filing a motion to dismiss his MSPB appeal from his discharge knowingly based on a false statement, wrongfully and maliciously placing a debt against him, providing wrong information regarding his employment situation, performance and conduct, and providing wrong information about him to a congressional representative.

5 U.S.C. §§ 2301 and 2302, which are relied upon by the Ninth Circuit in *Saul v. United States, supra*, 928 F.2d at 833-834, as limiting remedies available for "prohibited personnel practices" refer repeatedly to "employees" and "applicants for employment."

Recently this Court ruled in *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) that for purposes of Title VII relief the term "employees" includes former employees. However, the rationale of that decision is not necessarily applicable to the CSRA. Accordingly this Court is respectfully requested to consider and resolve whether the CSRA precludes former federal employees from suing under the FTCA for injuries caused by the federal employer's post employment actions.

CONCLUSION

Petitioner respectfully submits that he has presented important questions of federal law relating to the preemptive effect of Title VII and the Civil Service Reform Act, and the rights of federal employees to sue under the Federal Tort Claims Act, and that this Honorable Court should resolve and settle these questions.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 24, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-55363

D.C. No. CV-94-01167-JSR

LARRY COOPER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Submitted April 21, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Cooper's request for oral argument is denied.

Appendix A

Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

Larry Cooper appeals pro se the district court's dismissal of his claim for intentional and negligent infliction of emotional distress brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1994). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Kruso v. International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989), and we affirm.

Cooper contends that the district court erred by finding that some of his claims were preempted by Title VII. We disagree.

Title VII provides the exclusive federal jurisdiction for claims of discrimination in federal employment. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 828-29 (1976); *see also White v. General Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981) (Title VII is the sole remedy for a race discrimination claim by a federal employee). Title VII preemption, however, does not apply to "highly personal violations beyond the meaning of discrimination." *See Otto v. Heckler*, 781 F.2d 754 (9th Cir.) *amended by* 802 F.2d 337 (9th Cir. 1986).

In his complaint, Cooper alleged that the defendant subjected him to "a pattern of intentional acts of racial discrimination, harassment, reprisal and retaliatory action at his work." Cooper further alleged that he was given a potentially dangerous work assignment because of his racial and ethnic origin, and that he was placed on disability partially because of the defendant's racial discrimination. Based on these allegations, we conclude that the district court properly determined that Cooper's claims were preempted by Title VII to the extent that they were premised on racial discrimination. *See Brown*, 425 U.S. at 828-29. In addition, we agree with the district court that Cooper's allegations do not fit the "highly personal violation" exception to Title VII preemption. *See Otto*, 781 F.2d at 756-

57; *cf. Arnold v. United States*, 816 F.2d 1306, 1311 (9th Cir. 1987); *Kent v. Howard*, 801 F. Supp. 329, 332 (S.D. Cal. 1992).

Cooper also contends that the district court erred by finding that Cooper's remaining claims were preempted by the Civil Service Reform Act ("CSRA"). This contention also lacks merit.

The CSRA preempts suits brought by federal employees under the FTCA which are based on "prohibited personnel practices." *See Rivera v. United States*, 924 F.2d 946, 951-52 (9th Cir. 1991). "Prohibited personnel practices" include actions that violate the CSRA's merit system principles. *See Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991). "The merit system principles include treating employees fairly and equitably, 'with proper regard for their privacy and constitutional rights,' " and protecting employees against arbitrary action. *Id.* (citation omitted). Congress also intended "prohibited personnel practices" to cover a supervisor's violation of an employee's constitutional and privacy rights. *Id.* at 834.

Here, Cooper alleged that he was constantly harassed and closely monitored in retaliation for his union activity. Cooper further alleged that another Navy employee defamed him to a congressional representative, and that defendants acted to deny or delay payment of his benefits. Because Cooper's allegations relate to or arise out of personnel actions that violate the CSRA's merit system principles, the district court did not err by concluding that Cooper's claims were preempted by the CSRA insofar as they fell outside of Title VII preemption. *See Rivera*, 924 F.2d at 951-52.

AFFIRMED.[1]

---

1. Because we find that Cooper's claims are preempted by either Title VII or the CSRA, we need not address Cooper's contention that his claims are not barred by the FTCA's two-year statute of limitation.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JANUARY 9, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NUMBER: 94-1167-R(CM)

LARRY COOPER

V.

UNITED STATES OF AMERICA

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss without leave to amend is granted. Plaintiff's amended complaint is dismissed without leave to amend.

January 9, 1996
Date

Roberta Westdal
Clerk

MRussell s/ M. Russell
(By) Deputy Clerk

ENTERED ON January 9, 1996

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA FILED JANUARY 8, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL NO. 94-1167-R (CM)

LARRY COOPER,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITHOUT LEAVE TO AMEND

This matter comes before the Court on Defendant's second motion to dismiss. Defendant United States of America argues that Plaintiff's Federal Tort Claims Act ("FTCA") causes of action are time barred and are preempted by Title VII of the Civil Rights Act of 1964, the Civil Service Reform Act ("CSRA"), and the Federal Employees Compensation Act ("FECA"). For the reasons given below, Defendant's motion is granted without leave to amend.[1]

I. Background

Plaintiff's allegations are set forth in more detail in this

1. Pursuant to Southern District of California Local Rule 7.1(d.1.), this Court finds this motion suitable for decision without oral argument.

Court's April 11, 1995, Order. Only the facts relevant to the instant motion are repeated here.

On October 30, 1992, Plaintiff submitted an administrative claim pursuant to 28 U.S.C. § 2675(a) to the Department of the Navy. First Amended Complaint ("FAC") ¶ 5. The Navy denied Plaintiff's claim on January 24, 1994. On July 22, 1994, Plaintiff filed a complaint in this Court listing claims for intentional and negligent infliction of emotional distress pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.* Plaintiff alleged that beginning in 1983 and continuing "until and after" Plaintiff's discharge on April 1, 1991, members of the Navy and Navy employees discriminated against him on the basis of his race and his union activities. Compl. ¶ 7-9.

On April 11, 1995, this Court granted Defendant's motion to dismiss the complaint without prejudice and with leave to amend. With respect to his race-based claims, the Court reasoned that Plaintiff's FTCA claims essentially stated discriminatory employment practices related to his work and were therefore preempted by Title VII. This Court specifically listed Plaintiff's claim that he was terminated while on medical leave as preempted by Title VII. With respect to his claims not based on race this Court held that Plaintiff's claims related to the supervisor/subordinate relationship and were therefore preempted by the CSRA.

On May 17, 1995, Plaintiff filed an amended complaint. On September 12, 1995, Defendant filed the instant motion to dismiss. Defendant argues that Plaintiff's claims are time barred and are still preempted under Title VII and the CSRA.

Appendix C

II. Discussion

A. Applicable Legal Standard

On a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, although a defendant is the moving party, the plaintiff bears the burden of establishing that the Court has subject matter jurisdiction. *See* William Schwarzer, et al., *California Practice Guide, Federal Civil Procedure Before Trial*, § 9:77 (1995). In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1675 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

B. Statute of Limitations

A tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). A cause of action "accrues" when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986). Ninth Circuit law states that "timely compliance with 28 U.S.C. § 2401(b) is jurisdictional." *Rosales v. United States*, 824 F.2d 799, 802 (9th Cir. 1987). Thus, unless Plaintiff establishes that he timely complied with § 2401(b), this Court lacks jurisdiction to consider Plaintiff's claims.

Defendant argues that the bulk of Plaintiff's allegations claims are time barred and that this Court already held the remaining allegations to be preempted by Title VII. This Court agrees.

Appendix C

Plaintiff submitted his administrative claim pursuant to 28 U.S.C. § 2675(a) on October 30, 1992. Thus, this Court lacks jurisdiction over any claim accruing prior to October 30, 1990. Plaintiff alleges ongoing harassment and racial discrimination which permeated the Navy and which was directed at Plaintiff as he was transferred from one assignment to another. FAC ¶ 31. However, the allegations primarily involve conduct from 1983 through 1985. FAC ¶¶ 7-28. Two incidents occurred in 1987. FAC ¶¶ 29-30. And Plaintiff alleges few incidents in 1989-90 which occurred prior to October 30, 1990. FAC ¶¶ 31-35. Plaintiff had knowledge of all the events alleged to have occurred before October 30, 1990, and such events are therefore time barred.[2] With respect to the allegations of misconduct occurring after October 30, 1990, Defendant contends they are preempted. As discussed below, this Court agrees.

C. Title VII Preemption

Title VII "provides the exclusive federal jurisdiction for claims of discrimination in federal employment." *Brown v. General Servs. Admin.*, 425 U.S. 820 (1976); *see also White v. GSA*, 652 F.2d 913, 917 (9th Cir. 1981) (Title VII is the sole remedy for a race discrimination claim by a federal employee). If Plaintiff's claims are preempted, this Court lacks subject matter jurisdiction. *See Stallcop v. Kaiser Foundation Hosp.*, 820 F.2d 1024, 1048 (9th Cir. 1987) (preemption is a matter of subject matter jurisdiction).

Title VII preemption, however, does not apply where the

2. Since this Court finds these allegations to be time barred, it need not determine whether they involve highly personal violations to avoid preemption by Title VII. *See Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir. 1986); *Kent v. Howard*, 801 F. Supp. 329, 332 (S.D. Cal. 1992).

discrimination goes beyond discrimination in the workplace and involved "highly personal" violations. *Brock v. United States*, 64 F.3d 1421, 1422-23 (9th Cir. 1995) (holding rape to be a highly personal violation not preempted by Title VII's remedy for sexual discrimination); *Otto v. Heckler*, 781 F.2d 754, 756-57 (9th Cir. 1986) (holding supervisor's conduct of making defamatory remarks about plaintiff's sexuality, following her, telephoning her, and placing her in fear of sexual abuse extended beyond employment discrimination actionable under Title VII); *Kent v. Howard*, 801 F. Supp. 329, 3332 (S.D. Cal. 1992) (holding "touching and grabbing the plaintiff's breasts, legs, hips, and buttocks, making obscene gestures with mouth and tongue, attempting to kiss the plaintiff forcibly, following the plaintiff and harassing her as she left work, and describing dimensions of private parts" extended beyond employment discrimination).

In response to Defendant's argument that no allegedly tortious conduct occurred after October 30, 1995, Plaintiff points to his allegation that he was wrongfully terminated on April 1, 1991, and that Defendant continues to deny and delay Plaintiff's benefits. *See* FAC ¶ 36-38. Plaintiff further alleges that his removal "was the culmination of years of concerted, orchestrated harassment, racial discrimination . . ." FAC ¶ 38. However, this Court's April 11, 1995, Order found these allegations to be preempted by Title VII. Other allegedly actionable conduct occurring after October 30, 1990 includes Defendant taking legal action in response to Plaintiff's administrative claims and administrative conduct in general. FAC ¶ 41-42. Plaintiff's allegations which are not time barred simply do not fit the "highly personal violation" exception to preemption by Title VII.

Appendix C

D. CSRA Preemption

The Civil Service Reform Act ("CSRA") provides a comprehensive system for redressing personnel grievances. *See Saul v. United States*, 928 F.2d 829, 833-34 (9th Cir. 1991). The CSRA offers an administrative remedy to federal employees who allege "prohibited personnel practices." *Id.* at 833. In *Saul*, the Ninth Circuit interpreted broadly the phrase "prohibited personnel practices." The court found that "Congress *did* expect 'prohibited personnel practices' to cover supervisors' violations of employees' constitutional and privacy rights." *Id.* at 834 (emphasis added). As this Court noted in *Kent*:

> The [CSRA] describes "personnel actions" as including an appointment, a promotion, a disciplinary or corrective action, a transfer, a reinstatement, a restoration, a reemployment, a performance evaluation, a decision concerning pay, benefits or any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level. 5 U.S.C. § 2302(a)(2)(A)(i)-(x).

Kent, 801 F. Supp. at 333.

Plaintiff's remaining allegations involving conduct regarding Defendant denying benefits, taking legal recourse, misleading a congressional representative, and other administrative acts, do not overcome the preemptive effect of CSRA. Consequently, as this Court previously ruled, the CSRA

preempts Plaintiff's emotional distress causes of action insofar as they have not already been preempted by Title VII.[3]

III. Conclusion

Plaintiff's FTCA causes of action are either time barred or preempted by Title VII and the CSRA. Accordingly, this Court lacks subject matter jurisdiction over Plaintiff's Amended Complaint. Defendants motion to dismiss is granted. Plaintiff's Amended Complaint is dismissed without leave to amend.

IT IS SO ORDERED:

Date: 1/8/96

s/ John S. Rhoades, Sr.
John S. Rhoades, Sr.
United States District Judge

Copies to:

All Parties

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3. Since this Court has determined that both of Plaintiff's FTCA causes of action are either time barred or preempted by a combination of Title VII and the CSRA, this Court need not determine whether his causes of action also are preempted by the FECA, 5 U.S.C. § 8101 *et seq.*

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 21, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-55363

D.C. No. CV-94-01167-JSR
Southern California
(San Diego)

LARRY COOPER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Before: BROWNING, THOMPSON, and HAWKINS, Circuit Judges.

The petition for rehearing is denied.

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

No. 97-699

In the Supreme Court of the United States

OCTOBER TERM, 1997

LARRY COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claims, brought under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, that certain actions by his supervisors constituted discrimination and intentional and negligent infliction of emotional distress are preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-699

LARRY COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 112 F.3d 515 (Table). The opinions and orders of the district court (Pet. App. 4a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1997. A petition for rehearing was denied on July 21, 1997. Pet. App. 12a. The petition for a writ of certiorari was filed on October 20, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 22, 1994, petitioner, a former civilian employee of the United States Navy who is currently on disability retirement, initiated this lawsuit in the United States District Court for the Southern District of California against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, alleging intentional and negligent infliction of emotional distress. Pet. App. 6a. The complaint included allegations that petitioner's supervisors had wrongfully (1) terminated his employment, (2) moved the Merit Systems Protection Board to dismiss his appeal, (3) failed to give him adequate assistance in seeking to vindicate his rights to disability benefits, sick leave, and annual leave, (4) attributed unpaid debts to him in his personnel record, (5) made disparaging statements regarding his job performance, job attendance, and workplace conduct, (6) released information concerning his job performance and employment complaints to a congressional representative, and (7) failed to solicit his comments on a reassignment form. Order Granting Def.'s Mot. to Dismiss 2-3. On April 11, 1995, the district court dismissed petitioner's complaint without prejudice, on the ground that petitioner's allegations all dealt with employment-related actions and were thus preempted by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of Title 5 of the United States Code). Order Granting Def.'s Mot. to Dismiss 3-7.

2. On June 23, 1995, petitioner filed an amended complaint, repeating most of the allegations from the

first complaint and adding several more. In his amended complaint, petitioner claimed that security officers of his employer had broken into his locker and automobile, and that his supervisors had wrongfully denied him access to a telephone in his workplace, required him to work in isolation, transferred him to a new workplace in retaliation for his union involvement and because of his racial and ethnic origin, monitored his work habits unnecessarily closely, stared at him in an intimidating fashion, and engaged in other activities amounting to a pattern of intentional acts of racial discrimination, harassment, reprisal and retaliation for his involvement in the union. See First Amended Complaint 8-10. On January 8, 1996, the district court dismissed petitioner's amended complaint, this time without leave to amend. Pet. App. 5a-11a. The court found that many of petitioner's new claims were time-barred[1] and that the new claims that were not time-barred dealt solely with employment-related conduct and were thus preempted by Title VII and by the CSRA. *Id.* at 7a-11a.

3. The court of appeals affirmed the district court's dismissal of petitioner's complaint, holding that all of petitioner's claims dealt either with racial discrimination in employment or with prohibited personnel practices and were thus preempted by Title

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[1] Petitioner had submitted his administrative claim under the FTCA on October 30, 1992, but the bulk of the conduct underlying his amended complaint occurred more than two years before that date. See Pet. App. 8a; 28 U.S.C. 2401(b) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.").

VII and the CSRA. Pet. App. 1a-3a.[2] The court observed that, under this Court's decision in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), Title VII provides the exclusive judicial remedy for claims of discrimination in federal employment. Pet. App. 2a. Accordingly, petitioner's claims that his employer had subjected him to a "pattern of intentional acts of racial discrimination" at his workplace were preempted by Title VII. The court acknowledged (*ibid.*) that, under its own precedent, an exception to Title VII preemption is available for allegations of "highly personal violations"—an exception that has so far been found applicable to allegations of physical sexual abuse, see, *e.g.*, *Arnold* v. *United States*, 816 F.2d 1306 (9th Cir. 1987); *Kent* v. *Howard*, 801 F. Supp. 329 (S.D. Cal. 1992), and to allegations of persistent sexual harassment, see, *e.g.*, *Otto* v. *Heckler*, 781 F.2d 754, amended on other grounds, 802 F.2d 337 (9th Cir. 1986). The court, however, upheld the district court's rejection of petitioner's attempt to fit his claims within that exception. Pet. App. 2a-3a.

The court of appeals also held that those claims that were not preempted by Title VII dealt with "prohibited personnel practices" and were thus preempted by the CSRA. Pet. App. 3a (quoting 5 U.S.C. 2302(a)(1)). Because petitioner's remaining allegations, which dealt with matters such as how petitioner's supervisors monitored his work habits and statements his supervisors allegedly made to a congressional representative regarding petitioner's

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[2] The court of appeals did not reach the question whether any of petitioner's claims were time-barred, because it held that all the claims were preempted. Pet. App. 3a n.1.

employment, "relate[d] to or ar[o]se out of personnel actions that violate[d] the CSRA's merit system principles," the court upheld the district court's dismissal of the claims that were not preempted by Title VII. See *ibid.*

ARGUMENT

The decision of the court of appeals that petitioner's claims are preempted either by Title VII or by the CSRA is correct. That decision is consistent with this Court's precedent and does not conflict with the decision of any other court of appeals. The straightforward application by the court of appeals of this Court's decision in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), as well as of its own precedent, to the specific allegations in petitioner's amended complaint presents no legal issue warranting review by this Court.

1. The court of appeals correctly concluded that many of petitioner's claims under the FTCA are preempted by Title VII. In *Brown*, this Court observed that Title VII, "with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible." 425 U.S. at 833. Congress intended Title VII to provide the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Id.* at 829. Title VII must therefore be treated as "the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 835. The court of appeals properly applied *Brown* in dismissing petitioner's claims based on allegations that his supervisors had monitored his work habits too intrusively,

wrongfully transferred him to undesirable positions, and taken other adverse employment actions against him because of his race.

Petitioner argues (Pet. 7) that the court of appeals misapplied *Brown* because the claims that the court found preempted by Title VII arose from conduct motivated not only by discriminatory animus but also by the desire to retaliate against petitioner for his union involvement. Petitioner misreads the opinion of the court of appeals, which held only that petitioner's claims are preempted by Title VII "*to the extent* that they [a]re premised on racial discrimination." Pet. App. 2a (emphasis added). To the extent the claims are based on conduct in retaliation for petitioner's union involvement, the claims are preempted because Congress has provided for exclusive review of those claims under the CSRA. See 5 U.S.C. 7102, 7116(a)(2), 7118(a)(7), 7123(a).[3] Thus, even if petitioner alleged two improper motives for the same actions, and even if one of those alleged motives did not involve racial animus, the court of appeals was nonetheless

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[3] Section 7102 provides that each employee of a covered federal agency "shall have the right to form, join, or assist any labor organization." Section 7116(a)(2) provides that it shall be an "unfair labor practice" for a covered federal agency to "encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment." Section 7118 sets out the procedure for filing a complaint of an unfair labor practice. A complainant may receive a hearing before the Federal Labor Relations Authority (FLRA), which may issue an order requiring the employer to cease and desist from the unfair labor practice and to take "such other actions as will carry out the purpose" of the CSRA. 5 U.S.C. 7118(a)(7). Judicial review of the FLRA's final order may be obtained pursuant to Section 7123(a).

correct in holding that petitioner's claims may not be brought under the FTCA.[4]

2. a. The court of appeals was also correct in holding that petitioner's other claims are preempted by the CSRA. Petitioner's remaining claims dealt with employment-related actions taken by his supervisors, including decisions regarding transfers, outstanding service awards, workplace security, reclassifications, evaluations, promotions, sick leave, and termination. Those claims all fall within the CSRA's comprehensive scheme for redressing prohibited personnel practices in federal employment. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1988) (CSRA introduced "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration"); see also 5 U.S.C. 2302(a)(2)(A) (describing personnel actions). In *Fausto*, this Court held that the CSRA preempted a

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[4] Petitioner also argues (Pet. 6) that the court of appeals misapplied its own precedent by discussing the decisions in *Otto* v. *Heckler*, 781 F.2d 754, amended, 802 F.2d 337 (9th Cir. 1986), and *Kent* v. *Howard*, 801 F. Supp. 329 (S.D. Cal. 1992), even though they were "not relevant." That argument is unavailing because the court of appeals concluded that those decisions did not apply to petitioner's case. See Pet. App. 2a-3a. Ironically, petitioner himself had urged the court of appeals to apply those cases and to find that he had alleged "highly personal violations" that should not be preempted by Title VII. Pet. C.A. Reply Br. 4-5 ("[I]n this case many of the allegations are outrageous and highly personal.") (citing *Otto* and *Kent*); Pet. for Reh'g 1 ("The Court of Appeals overlooked the fact that [petitioner's] First Amended Complaint alleged a tortious pattern of conduct which included 'highly personal violations.'").

federal employee's suit under the Back Pay Act, 5 U.S.C. 5596, and the Tucker Act, 28 U.S.C. 1491, based on the allegation that he had been wrongfully suspended. The Court carefully examined the language and structure of the CSRA and concluded that Fausto was not included in the class of employees to whom the CSRA afforded administrative and judicial review of adverse personnel actions. 484 U.S. at 443-455. Explaining that "the CSRA established a comprehensive system for reviewing performance action taken against federal employees," this Court nonetheless held that his suit under the Back Pay Act and the Tucker Act was preempted. *Id.* at 455.

Since *Fausto*, the courts of appeals have agreed that the CSRA precludes damage claims based on adverse personnel actions by federal employers if those claims are brought under federal laws other than the CSRA. See, *e.g.*, *Rollins* v. *Marsh*, 937 F.2d 134, 137-139 (5th Cir. 1991) (CSRA precludes constitutional tort claim); *Saul* v. *United States*, 928 F.2d 829, 835-840 (9th Cir. 1991) (same); *Lombardi* v. *Small Business Admin.*, 889 F.2d 959, 960-961 (10th Cir. 1989) (same); *Stephens* v. *HHS*, 901 F.2d 1571, 1575-1577 (11th Cir.) (CSRA preempts constitutional claims and claim brought under Administrative Procedure Act (APA)), cert. denied, 498 U.S. 998 (1990); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-205 (6th Cir. 1990) (CSRA preempts claims brought under APA and Mandamus Act); *Berrios* v. *Department of the Army*, 884 F.2d 28, 30-31 (1st Cir. 1989) (CSRA preempts constitutional tort claim); *Volk* v. *Hobson*, 866 F.2d 1398, 1403-1404 (Fed. Cir.) (same), cert. denied, 490 U.S. 1092 (1989). See also *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983) (CSRA preempts

claim brought under APA); *Towers* v. *Horner*, 791 F.2d 1244, 1246 (5th Cir. 1986) (same); *Pinar* v. *Dole*, 747 F.2d 899, 909-913 (4th Cir. 1984) (CSRA preempts claims brought under Constitution and APA), cert. denied, 471 U.S. 1016 (1985). Not surprisingly, the courts of appeals have also found that the CSRA preempts state-law tort claims such as those petitioner brought here. See, *e.g.*, *Steele* v. *United States*, 19 F.3d 531, 532-533 (10th Cir. 1994); *Rollins*, 937 F.2d at 139-140; *Saul*, 928 F.2d at 840-843; *Rivera* v. *United States*, 924 F.2d 948, 952 (9th Cir. 1991); *Berrios*, 884 F.2d at 30-33; *Broughton* v. *Courtney*, 861 F.2d 639, 641-644 (11th Cir. 1988). See also *American Postal Workers Union* v. *United States Postal Serv.*, 940 F.2d 704, 708-709 (D.C. Cir. 1991); *Premachandra* v. *United States*, 739 F.2d 392, 393-394 (8th Cir. 1984).

b. In regard to his tort claims, petitioner seeks (Pet. 9) to involve this Court in reviewing the finer points of the Ninth Circuit's application of its own precedent. Petitioner suggests that the court of appeals' decision in this case conflicts with its earlier decisions permitting federal employees to bring claims under the FTCA alleging sexual harassment and rape by supervisors. See Pet. 9 (citing *Sheehan* v. *United States*, 896 F.2d 1168, amended, 917 F.2d 424 (9th Cir. 1990), and *Brock* v. *United States*, 64 F.3d 1421 (9th Cir. 1995)). This Court does not ordinarily grant certiorari to resolve conflicts between decisions of the same court of appeals. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974). In any event, there is no conflict between the court of appeals' decision in petitioner's case and its decisions in *Sheehan* and *Brock*: Unwanted sexual advances and rape are not personnel actions, unlike decisions regarding job transfers and reclassifications, out-

standing service awards, evaluations, promotions, sick leave, and the like. See *Brock*, 64 F.3d at 1425; 5 U.S.C. 2302(a)(2)(A).

In fact, the court of appeals in *Sheehan* did not even pass on the question whether the CSRA preempts tort claims for infliction of emotional distress. The court ruled instead that the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, does not preempt those claims because that Act covers only physical injury. See 896 F.2d at 1173-1174. Similarly, the district court decisions relied on by petitioner (Pet. 9), *Gergick* v. *Austin*, 764 F. Supp. 580 (W.D. Mo. 1991), and *Underwood* v. *United States Postal Service*, 742 F. Supp. 968 (M.D. Tenn. 1990), addressed the question of FECA preemption rather than CSRA preemption. Nor did the First Circuit, in *Santiago-Ramirez* v. *Secretary of Department of Defense*, 984 F.2d 16 (1993), decide whether the CSRA preempted the claim for intentional infliction of emotional distress alleged in that case. Rather, the court of appeals held that a claim for intentional infliction of emotional distress does not fall within the exceptions to liability set out in the FTCA, 28 U.S.C. 2680. See 984 F.2d at 20-21.

c. Petitioner also argues (Pet. 10) that this Court should review the dismissal of his complaint because, "in the situation here involved," petitioner could not have obtained sufficient redress for his personnel grievances under the CSRA. Petitioner does not attempt, however, to show that "the situation here involved" concerns a legal issue of any importance to anyone apart from himself. Review by this Court is thus unwarranted regardless of the merits of petitioner's argument. See, *e.g.*, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)

(noting that "it is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties").

In any case, petitioner's argument lacks merit. Petitioner complains that he would have had to file many CSRA complaints to address all of the wrongs that he believes were done him by his employer, but he does not suggest that the remedies available to him under the CSRA would be inadequate to redress those alleged wrongs. Moreover, even if petitioner could make a showing that the relief available to him under the CSRA is inadequate by some measure, that fact would not alter the preemption analysis. As this Court made clear in *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), the fact that Congress has not provided "complete relief" for all persons under a statutory scheme that provides an exclusive remedy does not give courts the authority to provide other avenues of relief. See also *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988).[5]

3. Finally, petitioner urges (Pet. 11) this Court to grant certiorari to "settle" the question whether a "former federal employee" may seek relief under the

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[5] Petitioner's reliance (Pet. 10) on Congress's failure to amend the FTCA to codify this Court's interpretation of the CSRA in *Bush* and *Fausto* is also unavailing. No principle of law requires Congress to ratify this Court's statutory interpretations for them to retain their force. Congress had no need to amend the FTCA because it had already made clear its intent to preempt all other remedies by the language and structure of the CSRA. Under petitioner's reasoning, Congress would be required to amend every law that it intends to affect by the enactment of another law.

FTCA. The FTCA does not use the term "employee" to describe a person entitled to bring tort claims against the United States. The question relevant to this case is the meaning of the term "employee" under the CSRA, rather than under the FTCA. If petitioner is an "employee" within the meaning of that term in the CSRA in regard to his employer's post-employment actions, then that Act preempts his tort claims based on those actions. On that question, there is no controversy for this Court to "settle," nor is any likely to arise. The CSRA expressly includes in its definition of "employee" any individual whose employment has terminated because of an unfair labor practice, see 5 U.S.C. 7103(a)(2)(B), and incorporates termination into the definition of a "prohibited personnel practice" for which a covered employee may seek redress See *Berrios*, 884 F.2d at 32 (citing 5 U.S.C. 2302(a)(2)(A)(iii), 7512).[6]

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[6] The express inclusion of former employees in the CSRA's definition of employee distinguishes the issue in this case from the issue of the meaning of "employee" in Title VII that this Court decided in *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843 (1997). Nevertheless, as petitioner acknowledges (Pet. 11), in *Robinson*, this Court held that the term "employee," as used in Title VII, includes former employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997